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STANDING GRANTED TO NONRESIDENT PLAINTIFFS TO CHALLENGE COMMUNITY DEVELOPMENT BLOCK GRANT APPLICATION

Abandonment of inner-cities and the growth of urban sprawl produce major problems for American cities.¹ Congress enacted Title I of the Housing and Community Development Act of 1974² (HCDA) primarily to aid in "the development of viable urban communities, by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and

1. C. HAAR, D. IATRIDIS, HOUSING THE POOR IN SUBURBIA 9-11 (1974); M. SCHUSSHEIM, THE MODEST COMMITMENT TO CITIES 11-20 (1974); Marett, *Social Stratification in Urban Areas*, in SEGREGATION IN RESIDENTIAL AREAS 172-89 (1973); Schnore, *Social Classes in Cities and Suburbs*, in SEGREGATION IN RESIDENTIAL AREAS 189-231 (1973).

2. 42 U.S.C. §§ 5301-5317 (1976). Actually the Housing and Community Development Act is an eight-title omnibus bill. Only Title I—Community Development, and a few sections of Title II—Assisted Housing, pertain to this Comment.

Title I creates a scheme for dispersing federal money to local governments, combining nearly all of the Department of Housing and Urban Development's (HUD) prior grant programs.

Communities receiving federal grants can spend the money only on activities listed in Title I. § 105, 42 U.S.C. § 5305 (1976). The principal eligible activities include acquisition of real property which is blighted, needs rehabilitation, or is for public works; construction or repair of public works; housing code enforcement; clearance and rehabilitation; relocation payments incident to Title I activities; provision of public services; and costs to develop and administer the program. *Id.* For discussions of the HCDA, see H. FRANKLIN, D. FALK & A. LEVIN, IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 59-78 (1975); The CDBG Training Advisory Committee, *An Advocacy Guide to the Community Development Block Grant Program*, 12 CLEARINGHOUSE R. 601 (January Supp. 1979); Fishman, *Title I of the Housing and Community Development Act of 1974*, 7 URB. LAW. 189 (1975).

moderate income.”³ To ensure community compliance with this goal, Title I sets out detailed application requirements,⁴ provisions for

3. § 101(c), 42 U.S.C. § 5301(c) (1976). Section 101 also lists specific purposes. The most important ones are as follows: (1) elimination of slums and blight; (2) code enforcement, demolition and interim rehabilitation; (3) “conservation and expansion of the Nation’s housing stock in order to provide a decent home and a suitable living environment for all persons, but principally those of low and moderate income;” (4) improvement of community services; (5) increase the “diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income; (6) stimulation of private investment in areas with declining population. *Id.* The purpose of deconcentration of housing opportunities marks the first time Congress has directed its attention to economic rather than racial segregation. See, H. FRANKLIN, D. FALK & A. LEVIN, *IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 64-65 (1975).

4. § 104, 42 U.S.C.A. § 5304 (Supp. 1979), which states in part:

(a) No grant may be made . . . unless an application shall have been submitted to the Secretary in which the applicant—

(1) sets forth a summary of a three-year community development plan which identifies community development needs and . . . objectives which have developed in accordance with areawide development planning and national urban growth policies;

(2) formulates a program [stating proposed activities and costs] . . . ;

(3) describes a program designed to—

(A) eliminate or prevent slums, blight, and deterioration . . . and,

(B) provide improved community facilities and public improvements . . . and;

(C) improve conditions for low- and moderate-income persons residing in or expected to reside in as a result of existing or projected employment opportunities in the community . . . and foster neighborhood development in order to induce higher income persons to remain in, or return to, the community;

(4) submits a housing assistance plan which—

(A) accurately surveys the condition of the housing stock in the community and assesses the housing assistance needs of lower-income persons . . . residing in or expected to reside as a result of existing or projected employment opportunities in the community . . .

(B) specifies a realistic annual goal for the number of dwelling units or persons to be assisted, including (i) the relative proportion of new, rehabilitated, and existing dwelling units, and (ii) the sizes and types of housing projects and assistance best suited to the needs of lower-income persons in the community, and

(C) indicates the general locations of proposed housing of lower-income persons, with the objective of (i) furthering the revitalization of the community . . . , (ii) promoting greater choice of housing opportunities and avoiding undue concentrations of assisted persons in areas containing a high portion of low-income persons . . . ;

. . . .

(6) provides satisfactory assurances that, prior to submission of its application, it has (A) prepared and followed a written citizen participation plan . . . ; (B) provided citizens with adequate information concerning the amount of funds available . . . ; (C) held public hearings . . . ; (D) provided citizens with an opportunity to submit comments concerning the community development

periodic review,⁵ and remedies for noncompliance.⁶ Title I, however,

performance . . . ; but nothing in this paragraph shall be construed to restrict the responsibility and authority of the applicant for the development of the application and the execution of its community development program.

(b) . . .

(2) any grant shall be made only on the condition that the applicant certify to the satisfaction of the Secretary that its Community Development Program has been developed so as to give maximum feasible priority to activities which will benefit low- or moderate-income families or aid in the prevention or elimination of slums or blight

(c) . . .

The Secretary shall approve an application . . . unless—

(1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or

(2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant . . . ; or

(3) the Secretary determines that the application does not comply with the requirements of this title, with specific regard to the primary purposes of principally benefitting persons of low- and moderate-income or aiding in the prevention of slums or blight . . . , or other applicable law or proposes activities which are ineligible under this title.

The Secretary may not disapprove an application on the basis that such application addresses any one of the primary purposes described in paragraph (3) to a greater or lesser degree than any other, except that such application may be disapproved if the Secretary determines that the extent to which a primary purpose is addressed is plainly inappropriate to meeting the needs and objectives which are consistent with the community's efforts to achieve the primary objective of this title. *Id.* The application receives automatic approval within 75 days of receipt unless the Secretary informs applicant of specific reasons for disapproval. *Id.* § 5304(f).

The requirement of a housing assistance plan is an important innovation in federal housing policy. The location of assisted housing is now left largely up to the community, as long as it promotes a greater choice of housing and avoids excessive concentration of low- and moderate-income persons. H.R. REP. NO. 93-1114, 93d Cong., 2d Sess. 8 (1974). This is a substantial shift away from control by federal officials. *Hearings on H.R. 1036 and H.R. 7277 Before the Subcomm. on Housing of the House Comm. on Banking and Currency*, 93d Cong., 1st Sess. pt. 1 at 311 (1973) (testimony of HUD Secretary James T. Lynn). The application and review procedures are to ensure continuity with prior federal housing and community development policy. H.R. REP. NO. 93-1114, 93d Cong., 2d Sess. 6 (1974). Congress also wanted to simplify application procedures that had been a bureaucratic disaster. *Id.* at 7 and 57.

It is important to note that HUD has the burden of showing the insufficiency of the application—"The Secretary shall approve an application unless . . ." 42 U.S.C.A. § 5304(c) (Supp. 1979). The regulations indicate that HUD will question the information given by the applicant community. Fishman, *Title I of the Housing and Community Development Act of 1974*, 7 URB. LAW., 189, 212; 24 C.F.R. § 507.306(b) (1979).

does not provide for judicial review of applications for Community Development funds.⁷ This omission hinders a plaintiff's ability to contest the adequacy and approval of a community's application because courts refuse to hear the challenge based on the standing doctrine.⁸ In a recent decision, *Coalition for Block Grant Compliance v. Department of HUD*,⁹ the United States District Court for the Eastern District of Michigan surprisingly granted lower-income persons standing to challenge a Title I grant.

In *Coalition*, the inner-city plaintiffs¹⁰ claimed HUD illegally approved the community development block grant application of a nearby suburb.¹¹ The court found that one of the primary purposes of Title I was to require cities to plan for the needs of low- and mod-

Literature on the performance of HUD supports this conclusion. *E.g.*, Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URBAN L. ANN. 137 (1976).

5. 42 U.S.C.A. § 5304(d) (Supp. 1979). Each grantee must submit an annual report assessing performance in view of the application's objectives. The Secretary must review the program at least once a year to make sure it conforms to the requirements of the Act and other relevant law. *Id.*

6. *Id.* §§ 111, 5311. Subsection (a) allows the Secretary to terminate or reduce payments; subsection (b) permits referral by the Secretary to the United States Attorney General for civil action. Subsection (c) concerns procedures for review. Section 5311 only deals with remedies for noncompliance due to *misuse* of the grant funds.

7. Another way to attack the sufficiency of an application is by administrative complaint. *See* Kushner, *supra* note 4, at 65-67. The chances for success are obviously limited when the Secretary has already approved the application. *Id.*

8. *See* Warren, *Commentary—The Housing and Community Development Act: Two Years After Hartford*, 30 AD. L. REV. 549 (1978). *See generally* Kushner, *supra* note 4.

9. 450 F. Supp. 43 (E.D. Mich. 1978).

10. The individual plaintiffs were low-income, minority residents of Detroit. The Act does not define low-income. HUD regulations define low- and moderate-income families as "families whose incomes do not exceed 80% of the median family income of the area as determined by the Secretary . . ." 24 C.F.R. § 570.3(o) (1979). Low- and moderate-income persons are "persons for whom the income of the family conforms with the definition of lower-income families as established in paragraph (o) . . ." *Id.* § 570.3(p).

11. The Coalition for Block Grant Compliance filed administrative complaints with HUD after the submission of the initial application by the City of Livonia. The Coalition claimed that the city's Housing Assistance Plan failed to set forth adequate goals to meet the needs of low- and moderate-income residents and those "expected to reside" in the city. The regional HUD office notified Livonia of the deficiencies and recommended disapproval of the application. City officials met with HUD administrators in Washington and submitted a revised Housing Assistance Plan. Agency inaction resulted in the application's approval. The Coalition again complained to HUD, emphasizing the inadequate "expected to reside" figures. HUD

erate-income persons such as the plaintiffs.¹² Therefore, the allegation that the application inadequately planned for the low- and moderate-income persons "expected to reside"¹³ in the suburb constituted injury in fact.¹⁴ The court also found that plaintiffs were persons within the zone of interests protected by the statute.¹⁵

Standing to sue is one of the threshold questions in any lawsuit.¹⁶ The court must decide whether the plaintiff is entitled to a judicial determination of the dispute's merits or particular issues within the dispute.¹⁷ In federal court the legal basis for standing rests primarily

took no further action until this suit was filed. *Coalition for Block Grant Compliance v. Department of HUD*, 450 F. Supp. 43, 46 (E.D. Mich. 1978).

12. Also plaintiffs were three community organizations. The court denied standing to two organizations composed solely of other organizations because they lacked members who suffered injury. The local chapter of the NAACP, however, had standing because it alleged injury to one of its members. 450 F. Supp. at 52, n.14.

13. § 104(a)(4)(A), 42 U.S.C.A. § 5304(a)(4)(A) (Supp. 1979). The "expected to reside" figure is an important part of the Housing Assistance plan. See note 4 *supra*. The figure is important for two reasons. First, it forces the applicant to account for lower-income workers who would reasonably be expected to move into the community if suitable housing was available. Determination of the figure at the time of the Coalition case depended on present and future employment opportunities within the community. 24 C.F.R. § 570.303(c)(2) (1977). The 1978 regulations drop this standard and go to one of reasonableness. 24 C.F.R. § 570.306(b)(2)(ii) (1979). For example, lower income-persons that commute to work in the community but cannot afford housing there qualified as one "expected to reside." U.S. Department of Housing and Urban Development Housing Assistance Plan: General Instructions for Forms HUD 7015.8 thru .11 (August 1976) (the instructions in effect at the time of the application of *Coalition* defendant suburb). The requirement of accounting for those "expected to reside" in the community furthers the purposes of combating economic segregation, see note 3 *supra*, and facilitating rational areawide developmental planning. Note 4 *supra* and H. FRANKLIN, D. FALK & A. LEWIN, *IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS* 63 (1975).

Second, many applicants have found the figure difficult to determine accurately, making it particularly prone to challenge. *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (*en banc*); *City of Hartford v. Hills*, 408 F. Supp. 889 (D. Conn. 1976). See note 55 *infra*.

14. See *Baker v. Carr*, 369 U.S. 186, 208 (1962).

15. See *Association of Data Processing Serv. Orgs. Inc. v. Camp*, 397 U.S. 150, 152-54 (1970).

16. See generally P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 150-205 (2d ed. 1973); K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 22.004-.007 (Supp. 1977); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645 (1973).

17. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Theoretically, standing should not depend on the merits of plaintiff's allegation of illegal conduct. But the source and

on the case or controversy requirement of Article III.¹⁸ Current standards minimally require the plaintiff to, "allege such a personal stake in the outcome of the controversy"¹⁹ as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.²⁰ A personal stake assures that the dispute is concrete²¹ and cast in an adversarial context proper for judicial interpretation.²² The Supreme Court expresses the constitutional minimum requirement as the presence of a "distinct and palpable injury"²³ to the plaintiff and a "fairly traceable"²⁴ "causal connection between the injury and the challenged conduct."²⁵ An alternative formulation of the causation requirement is whether the plaintiff would benefit from relief granted by the court.²⁶ Beyond this constitutional minimum, court-made rules of standing further limit access to federal court.²⁷

When asserting the violation of a statutory duty by administrative

nature of the claim are often crucial. *Id.* at 500. See, e.g., *Flast v. Cohen*, 392 U.S. 83, 99 (1968). See H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 156 (1973).

18. U.S. CONST. art. III, § 2. See, e.g., *Baker v. Carr*, 369 U.S. 186, 198-200 (1962) (claim of failure to reapportion state voting districts for 60 years clearly arises under the Constitution and is a 'case or controversy' within the meaning of Article III).

19. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

20. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975).

21. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

22. *Id.*

23. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

24. *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 261 (1977).

25. *Duke Power Co. v. Carolina Env'l. Study Group*, 438 U.S. 59, 72 (1978).

26. *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 43 (1976). See *Duke Power Co. v. Carolina Env'l. Study Group*, 438 U.S. 59, 74 (1978).

27. E.g., *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221-27 (1974); *United States v. Richardson*, 418 U.S. 166, 188-97 (1974) (Powell, J. concurring) (generalized grievance does not warrant jurisdiction); *United States v. Raines*, 362 U.S. 17, 20-22 (1960); *Barrows v. Jackson*, 346 U.S. 249, 255-56 (1953); *Tileston v. Ullman*, 318 U.S. 44, 45-46 (1943) (third-party standing). For a discussion of the related concepts of justiciability, ripeness, mootness, and advisory opinions, see H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM*, 150-205 (1973). The Supreme Court gives various reasons for these prudential limitations. These barriers to access to the federal courts arise from beliefs about the courts' limited role in the federal system. For example, courts fear that lowering the threshold for standing could inundate the courts with frivolous suits, thereby undermining reliance on the political process. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

action,²⁸ a plaintiff may base standing on either (1) a particular statute providing for judicial review of the action in question,²⁹ (2) the violation of a right created by the statute,³⁰ or (3) the right to act as a representative of the public interest.³¹ The Supreme Court in 1970

28. In some situations administrative action may be nonreviewable. *E.g.*, *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411 (1965) (Congress intended to permit agency discretion on desirability of proposed holding company because agency has the requisite expertise). Liberal interpretations of the Administrative Procedure Act, *see* note 29 *infra*, have created a presumption in favor of reviewability. The leading case is *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) (there must be pervasive reason to believe that Congress intended to cut off review). *See also* *Rusk v. Cart*, 369 U.S. 367, 379-80 (1962) (clear and convincing evidence necessary to preclude review).

29. Sometimes these provisions grant the right of review only on narrow and explicit questions. *E.g.*, the Federal Trade Comm'n Act, 15 U.S.C.A. § 45(c) (1976) (anyone subject to a cease and desist order by the Commission may obtain review in a United States court of appeals). Typically, however, the statutory provision is broadly drawn to include "any person aggrieved" or "adversely affected." *E.g.*, National Labor Relations Act, 29 U.S.C.A. § 160(f) (1976); Interstate Commerce Act, 49 U.S.C. § 1(20) (1976). Interpretations of these broad provisions fall within category three (3). *See* note 31 *infra*. *See also* Scott, *supra* note 16, at 654-58. One of the broadest of these interpretations is *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). The Supreme Court granted standing to two white tenants living in a housing complex owned by a landlord who allegedly discriminated against nonwhite tenants. The plaintiffs were persons "who claim to have been injured by a discriminatory housing practice" under the Fair Housing Act of 1968, § 810(a), 42 U.S.C. § 3610(a) (1976). The Douglas majority characterized the situation as public interest standing. 409 U.S. at 24.

30. These cases arise when a statute creates certain duties or standards of conduct for the government without also creating any private judicial remedies for enforcement. *See* Scott, *supra* note 16, at 649-54. Professor Albert suggests that the basis for the spread of these actions is due to (1) legislative "intent to protect or benefit a class of persons" and (2) "the inadequacy of other administrative or judicial remedies to prevent or redress the harm." Albert, *supra* note 16, at 454. These interests lead the courts to imply a private cause of action. *See, e.g.*, *J.I. Case v. Borak*, 377 U.S. 426 (1964) (private remedy implied under securities law as necessary to protect federally secured right). In *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968) the Court granted standing to a private utility challenging TVA expansion as violative of the TVA Charter. The utility had a right to be protected from TVA competition because that was the purpose of the disputed provision of the charter. The Court did not address the government's argument that protective intent should not, by itself, confer judicial remedies to private parties except by citing two cases involving a statutory judicial review provision. *Id.* at 6. *See* Albert, *supra* note 16, at 451, n.104. *See also* *Stark v. Wickard*, 321 U.S. 288 (1944).

31 This notion of "public interest" standing or "private Attorneys General" began in *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The radio station sought review of F.C.C. authorization of a comparative station. The Court granted standing under a judicial review provision even though neither the statute involved nor common law recognized a right to be free from competition. The Court con-

attempted a general reformulation of standing for review of government action.³² "the question is whether the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional provision in question."³³ The plaintiffs in that case based standing on the general right of persons aggrieved by agency action under the Administrative Procedure Act (APA),³⁴ possibly creating a fourth category. Unfortunately, the Court has never clearly explained either the zone of interest test or APA standing, forcing commentators and the lower federal courts³⁵ to look, as best they can, to subsequent decisions for

cluded that Congress' enactment of the judicial review provision indicated an intent to allow licensees injured by competition to sue the F.C.C. because they are the only persons interested enough to go to court. *Id.* at 477. See *Scripps-Howard v. F.C.C.*, 316 U.S. 4 (1942); *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943). Courts have struggled with reconciling public interest standing with the limitations imposed by the case or controversy requirements of Art. III. See notes 17-27 and accompanying text *supra*. For an excellent account of the cases, see Albert, *supra* note 16, at 476-93. The Supreme Court, however, has clearly indicated that the constitutional minimums for standing apply to plaintiffs seeking to protect the public interest. *Sierra Club v. Morton*, 405 U.S. 727 (1972) (*Sierra Club* has no standing to represent the public interest in conservation without a particularized injury caused by the challenged project). *Cf. Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), discussed in note 29 *supra*.

32. *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970) (companion case).

33. 397 U.S. at 153.

34. 5 U.S.C. §§ 701-706 (1976). Section 702 reads: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial relief thereof." The chapter does not apply when a statute specifically excludes judicial review, or the action "is committed to agency discretion by law." *Id.* § 701. To be reviewable the action must be final. *Id.* § 704. Plaintiff must also exhaust all other remedies before he can go to court. *Id.*

Commentators criticize the court's use of the zone of interest test for APA standing because it goes well beyond the meaning of the statute when enacted in 1946. The general understanding was that "legal wrong" refers to the old legal interest test used in cases without a statutory provision for judicial review. "Adversely affected or aggrieved . . . within the meaning of a relevant statute" refers to interpretations of specific statutory review provisions. See *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955); S. Doc. No. 248, 79th Cong., 2d Sess. 230, 413, 415 (1946) (views of then Attorney General Clark). For alternative readings of section 702, see Albert, *supra* note 16, at 453 n.105; Scott, *supra* note 16, at 659.

35. Professor Davis argues that the test is unworkable given the Court's lack of further explanation and may no longer be good law. K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 22.02-.11 (Supp. 1977). The Court has not applied the test since 1970. Only rarely have the lower federal courts denied standing based on the

guidance.³⁶

The majority of Supreme Court standing cases in the 1970's, whether statutory or constitutional claims, focuses on injury questions. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*,³⁷ indigents³⁸ claimed an illegal Internal Revenue Service revenue ruling³⁹ caused denial of free hospital services. The ruling held that to qualify as a charitable institution, the only service hospitals must offer to those who cannot pay is emergency room treatment.⁴⁰ The Court denied standing, claimed under the APA, because plaintiffs failed to show that the ruling resulted in the denial of services or that relief would probably result in such services.⁴¹

The *Simon* majority applied principles set forth in *Warth v. Sel-din*.⁴² In *Warth*, low- and moderate-income plaintiffs⁴³ claimed a nearby suburb's exclusionary zoning⁴⁴ practices purposely excluded

zone of interest. While three circuits have openly criticized the test, most lower federal courts merely mention the test without analysis. *Id.*

36. *Duke Power v. Carolina Env'l Study*, 438 U.S. 59 (1978), indicates that the test may no longer apply to constitutional claims. Plaintiffs, persons living near the proposed site of a nuclear power plant, contended that the congressional limitation of liability for nuclear accidents was unconstitutional. The Nuclear Regulatory Commission and the utility asserted that, in addition to an allegation of injury and a causal connection between the injury and the challenged conduct, plaintiffs must demonstrate a nexus between the injury and the constitutional rights asserted. The Court refused to extend this nexus test outside the limited context of taxpayer standing. *See Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974). Chief Justice Burger, writing for the majority, did not require anything more than a demonstration of "injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III." 438 U.S. at 79. The opinion did not mention the zone of interest test. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 260-61 (1978).

37. 426 U.S. 26 (1976).

38. Individuals, an unincorporated association, and several nonprofit corporations were plaintiffs. *Id.* at 32. The organizational plaintiffs were all representing their low-income members.

39. Rev. Rul. 69-545, 1959-2 C.B. 117, interpreting I.R.C. § 501(c)(3) (1954). The previous revenue ruling required that a hospital serve those who cannot pay "to the extent of its financial ability." Rev. Rul. 56-185, 1956-1 C.B. 202.

40. Rev. Rul. 69-545, 1959-2 C.B. 117.

41. 426 U.S. 26, 43 (1976). The allegations were "purely speculative." *Id.*

42. 422 U.S. 490 (1975).

43. Individual plaintiffs included nonresident taxpayers, minorities, and lower-income persons. A member of one organizational plaintiff attempted to build moderate-income housing in the defendant suburb. But at the time of trial the project was no longer active. *Id.* at 497.

44. For cases granting standing to challenge exclusionary zoning, see Arlington

racial and ethnic minorities.⁴⁵ The Court denied standing, finding the lack of lower-priced housing resulted from the economics of the housing market, not from defendant's actions. Regardless of any injury, each plaintiff failed to allege "specific concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the Court's intervention."⁴⁶

In *Arlington Heights v. Metropolitan Housing Corp.*,⁴⁷ plaintiffs raised a nearly identical claim.⁴⁸ The Court granted standing because the suburb denied the rezoning petition of a developer actively seeking to build low-income housing.⁴⁹ Relief, then, would result in a substantial probability that the developer would build suitable housing in which the individual plaintiff could reside.⁵⁰ This probability established the necessary causal relationship between the exclusionary zoning and the injury.⁵¹

Heights v. Metropolitan Hous. Corp., 429 U.S. 252 (1977) (standing as plaintiffs granted to nonresident and builder); *Dailey v. City of Lawton*, 425 F.2d 1037 (10th Cir. 1970) (resident and nonresident plaintiffs granted standing); *NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975) (resident and nonresident plaintiffs granted standing under a state statute).

45. Plaintiffs also alleged the town boards acted in an arbitrary and discriminatory manner by delaying and denying proposals for low- and moderate-income housing. 422 U.S. 490, 495 (1975).

46. *Id.* at 508.

47. 429 U.S. 252 (1977).

48. The suburb denied a petition for rezoning to build a lower-income development. Black individuals and the developer alleged that the motivation for the denial was racial discrimination. Plaintiffs specifically claimed violations of the Fourteenth Amendment and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-19 (1976). 429 U.S. at 254.

49. The developer also had standing because it spent money on plans for the project and had an interest in making low-income housing available. The black plaintiff was necessary to the allegation of racial discrimination. *Id.*, at 262.

50. The black plaintiff commuted to work in the defendant community and lived in a five-room house with his mother and his son. *Id.* at 264.

51. The important standing decisions since *Arlington Heights* are *Orr v. Orr*, 99 S. Ct. 1102 (1979) (husband granted standing to claim state alimony statute unconstitutional because men, but not women, must pay alimony even though one method of relief, state extension of alimony rights to men, would not benefit the plaintiff); *Duke Power Co. v. Carolina Env'l. Study*, 438 U.S. 59 (1978) (discussed in note 36 *supra*) and *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (state commission to promote the sale of Washington apples had standing to challenge a North Carolina statute requiring only United States grades on containers of apples sold in North Carolina).

*Evans v. Lynn*⁵² further illustrates *Warth*. Nonresident minority plaintiffs challenged HUD grants for construction of a sewer facility⁵³ and the preservation of a swamp as a recreation area.⁵⁴ Plaintiffs asserted that HUD, in not evaluating the recipient town's development policies, failed to perform its affirmative duty to effectuate anti-discrimination in programs receiving financial assistance. The federal court of appeals dismissed plaintiffs' injury claim because plaintiffs failed to show that they unsuccessfully sought housing in the town, or that the approved grant money could go to any project that would make more suitable housing available.⁵⁵ Any injury or benefit was even more remote and speculative than the claim rejected in *Warth*.⁵⁶

Several lower federal courts have granted standing to challenge HUD's approval of applications for community development grants. In *NAACP v. Hills*,⁵⁷ a district court granted standing based on an allegation that members of plaintiff organization were unable to live in adequate housing within their community. The relief requested, ordering the city to spend more of its grant on rehabilitation or acquisition of property for construction of low-cost housing, would benefit plaintiff's members.⁵⁸ Together, these two findings were sufficient to meet the *Warth* tests.⁵⁹

52. 537 F.2d 571 (2d Cir. 1975) (*en banc*).

53. *Id.* at 573. The grant for the sewer was made in 1969 under the Community Facilities and Advance Land Acquisition Act, 42 U.S.C. § 3102 (1970).

54. 537 F.2d at 573. The grant for acquisition of the swamp was made pursuant to the Outdoor Recreation Program Act, 16 U.S.C. § 4601 (1970).

55. 537 F.2d at 573. The antidiscrimination statute is 42 U.S.C. § 2000(d) (Supp. IV 1974). Plaintiffs also claimed violation of a similar requirement with respect to the government's fair housing policy. 42 U.S.C. §§ 3601, 3608(c), (d)(5) (1976).

56. 537 F.2d at 595. The fact that the suit was brought under a particular statutory grant does not avoid the constitutional injury requirement of *Warth*. *Id.* at 592. See notes 19-26 and accompanying text *supra*; O'Shea v. Littleton, 414 U.S. 488, 493-94 (1974); Schlesinger v. Reservists to Stop the War, 418 U.S. 208, 218 (1974).

57. 412 F. Supp. 102 (N.D. Cal. 1976).

58. *Id.* at 106.

59. *Id.* Philadelphia Welfare Rights Org. v. Embry, 438 F. Supp. 434 (E.D. Penn. 1977) (granted standing in a situation similar to *NAACP v. Hills*, following the *Warth* reasoning). In Knoxville Progressive Christian Coalition v. Testerman, 404 F. Supp. 783 (E.D. Tenn. 1975), low- and moderate-income residents living in blighted areas of the city challenged the eligibility of several proposed community development programs. Defendants contended that the threatened injury was not casually related to their conduct. Even if the challenged projects were found ineligible those funds might not be spent on projects that would benefit plaintiffs. The court refused to accept this

The facts of *City of Hartford v. Towns of Glastonbury*⁶⁰ closely resemble those of *Coalition*. The city and two of its low-income residents challenged HUD's approval of block grants to several of the surrounding suburbs. Plaintiffs claimed the submission and approval of the suburbs' applications without considering those "expected to reside"⁶¹ violated Title I. The circuit court denied standing because it was improbable that any lack of compliance would affect the plaintiffs.⁶² The basis for this denial was the factual finding that an increase in the "expected to reside" figures would not increase the number of available housing units.⁶³

The *Coalition* plaintiffs are nonresidents, like the individual plaintiffs in *Warth*⁶⁴ and *Arlington Heights*.⁶⁵ The *Coalition* court found *Warth* inapplicable because plaintiffs did not base their injury claim on an inability to live in the suburb, but that the suburb failed to adequately plan for their needs as Congress intended.⁶⁶ This reasoning indicates that the *Coalition* court believed HUD violated a right to planning created by the HCDA.⁶⁷ Having avoided *Warth*, the court found that only an *allegation* of injury and of the right to planning that meets the zone of interest test was necessary for plaintiffs'

argument because, then, no low- or middle-income plaintiffs would have standing to challenge improper allocation of Title I grants. 404 F. Supp. at 788.

60. 561 F.2d 1032 (2d Cir. 1977) (*en banc*). The district court granted standing. 408 F. Supp., 889 (D. Conn. 1976). The court of appeals agreed. 561 F.2d at 1032-48 (2d Cir. 1977). The appeals court *en banc* denied standing based on *Warth*, *Arlington Heights*, and *Simon v. Eastern Ky.*

61. See note 13 *supra*, for a discussion of the "expected to reside" figure. A HUD memorandum allowed applicants to obtain approval without an "expected to reside" figure on the first-year application because of difficulties in estimating the figure. Several of the defendant towns then submitted an "expected to reside" figure of zero. 561 F.2d at 1041.

62. 561 F.2d at 1051. One of the crucial factors in this decision is that defendant town's housing assistance plan fully used all available funds for low-income housing subsidies.

63. *Id.* In addition, the court found the "expected to reside" figure not to be a "goal for the future which communities are required to satisfy, but merely a prediction of what is going to happen." *Id.*

64. 422 U.S. 490 (1975).

65. 492 U.S. 252 (1977).

66. 450 F. Supp. 43, 51 (E.D. Mich. 1978). The unplanned-for needs are the failures to plan for housing for lower-income persons "expected to reside" in the community. *Id.*

67. See note 30 and accompanying text *supra*.

standing.⁶⁸ Allegations of illegal agency action, however, do not make the *Warth* tests inapplicable.⁶⁹ Assuming there is a right to planning, plaintiffs must still show the constitutional minimum of injury in fact and probable benefit from relief.⁷⁰

The *Coalition* plaintiffs claimed that defendants' illegal actions would deprive them of housing opportunities outside low-income areas, in violation of Title I.⁷¹ To establish an injury claim a plaintiff must allege facts that support an "actionable causal relationship"⁷² between the asserted illegal action and the injury. Plaintiffs alleged two facts to support this causal connection: (1) they were among those "expected to reside"⁷³ within the meaning of Title I, and (2) they desired to live in the suburb. Neither pertinent case law nor interpretations of Title I suggest these are sufficient grounds for standing.

Plaintiffs are not, and probably will not be, among those "expected to reside" in the suburb. The "expected to reside" figure, according to HUD regulations, is "a result of existing or planned employment facilities"⁷⁴ in the applicant community. No *Coalition* plaintiff claimed that he or she worked, or expected to work in the suburb.⁷⁵ Unless the regulation was invalid, HUD has no duty toward plaintiffs implied from Title I.⁷⁶ Other cases concerning HUD's duty under

68. 450 F. Supp. at 51.

69. See the discussion of *Simon v. Eastern Ky. Welfare Rights Org.*, notes 37-41 and accompanying text *supra*. See *Duke Power Co. v. Carolina Env'l. Study*, 438 U.S. 59, 2620, 2630 (1978).

70. A detailed discussion of the applicability of the zone of interests test is beyond the scope of this Comment. The test is difficult to apply. See notes 33-36 *supra*. The *Coalition* court simply asserts that the test is met, implying that it is not important to the grant of standing. 450 F. Supp. at 51.

71. 450 F. Supp. 43, 47 (E.D. Mich. 1978).

72. *Warth v. Seldin*, 422 U.S. 490, 507 (1975). See also *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973).

73. 42 U.S.C. § 5304(a)(4)(A) (1976). See note 13 and accompanying text *supra*.

74. 24 C.F.R. § 570.303(c)(2) (1977).

75. Multiple Defendants' Brief in Support of Summary Judgment at 19-20.

76. The *Coalition* opinion does not mention the regulation. The Housing and Community Development Act does not define "expected to reside."

The 1978 regulations changed the standard. 43 Fed. Reg. 41, 8467 (1978) (to be codified in 24 C.F.R. § 570.206(b)(2)(ii) (effective August 1, 1978).

The application now must indicate the needs of lower-income families "who could reasonably be expected to reside in the community." *Id.* Subsection (A) sets forth the particular statistical method for calculation. HUD may, at its option, require a more precise means for the determination. *Id.* § 570.306(b)(2)(iii).

Title I,⁷⁷ where plaintiffs reside in the applicant community, do not support standing for nonresidents who do not even work in the community. For example, in *NAACP v. Hills*,⁷⁸ the court specifically found that relief would probably result in potential rehabilitation of the *plaintiffs' homes* or acquisition of property to build low-income housing for the *plaintiffs*.⁷⁹ Surely the suburban municipality cannot be expected to plan for the housing needs of all lower-income persons in the surrounding metropolitan area.

The *Coalition* plaintiffs attempted to distinguish themselves from other lower-income persons in the area by claiming a desire to live in the suburb. They did not show, however, that they seriously sought such housing.⁸⁰ In *Evans v. Lynn*⁸¹ the Second Circuit found the plaintiffs' failure to seek housing in the suburb receiving HUD grants supported the conclusion that plaintiffs were in no way injured by the allegedly illegal grants.⁸²

The *Warth* plaintiffs did seek housing in defendant suburb. The Supreme Court carefully noted the unsuccessful attempts by the plaintiffs to find housing,⁸³ but then denied standing on unrelated grounds.⁸⁴ This suggests that, absent these unrelated grounds, the demonstration of exclusion would be sufficient to establish an injury claim.⁸⁵ Even if such a showing would be sufficient it would not have aided the *Coalition* plaintiffs' claim. The cursory search for housing

77. The cases challenging Title I applications are: *Philadelphia Welfare Rights Org. v. Embry*, 438 F. Supp. 434 (E.D. Pa. 1977); *NAACP v. Hills*, 412 F. Supp. 102 (N.D. Cal. 1976); *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975). See notes 57-59 and accompanying text *supra*.

78. 412 F. Supp. 102 (N.D. Cal. 1976).

79. *Id.* at 106.

80. Multiple Defendants' Brief in Support of Summary Judgment 19-20. One of the plaintiffs engaged in an "eyeball" survey of housing in the suburb and rejected it as too expensive. *Id.* at 20. Another considers the suburb a desirable community and would like to live there. *Id.*

81. 537 F.2d 571 (2d Cir. 1975) (*en banc*). For discussion see notes 52-56 and accompanying text *supra*.

82. 537 F.2d at 595.

83. One of the *Warth* plaintiffs searched the surrounding suburbs for a period of two years. *Warth v. Seldin*, 422 U.S. 490, 503 n.14 (1975).

84. The Court found that plaintiffs' inability to reside in the suburb resulted from the economics of the area housing market and not from the defendants' allegedly illegal acts. *Id.* at 506. Plaintiffs also failed to show that if relief was granted, one of the other plaintiffs would construct a housing project in which the plaintiffs could reside. *Id.* at 505-06.

85. The *Warth* majority never denied that plaintiffs were excluded from the sub-

made by the *Coalition* plaintiffs fell far short of the substantial efforts made by the *Warth* plaintiffs.⁸⁶

To have standing plaintiffs must show, in addition to injury in fact, that the relief requested would have a substantial probability of benefiting plaintiffs.⁸⁷ The *Coalition* plaintiffs asked the court to enjoin the receipt or expenditure of the community development grant.⁸⁸ According to *Warth*, this relief must produce a substantial probability that suitable housing would become available for plaintiffs. This is unlikely to occur. Even if the municipality amended its application⁸⁹ the use of the grant funds could only produce a minimal increase in available housing for two reasons. First, Title I funds cannot be spent on actual construction of new housing.⁹⁰ This fact was crucial to the Second Circuit's denial of standing in *City of Hartford v. Towns of Glastonbury*.⁹¹ The *Coalition* plaintiffs also fail to allude to any specific housing assistance⁹² or rehabilitation that could

urb, but only that exclusion was not due to exclusionary zoning. *Id.* at 507. See the dissent of Justice Brennan. *Id.* at 523-26.

86. Compare notes 80 and 83 *supra*.

87. *Warth v. Seldin*, 422 U.S. 490, 508 (1975).

88. 450 F. Supp. at 45.

89. Defendants pointed out that the time period for the application's amendment was about to expire. Therefore, there was a chance that if the court enjoined expenditure of the funds they would be lost altogether. The *Coalition* court did not care. *Id.* at 50. The possibility of losing the grant was one of the reasons the second circuit denied standing in *City of Hartford v. Towns of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (*en banc*). Plaintiffs would not benefit if Title I funds were not allocated for that year. The *Coalition* court did not consider this possibility when it discussed standing. The suburb did, in fact, lose the grant as a result of the injunction issued by the *Coalition* court.

90. 42 U.S.C. § 5305(a) (1976); 24 C.F.R. § 570.201 (1978). There is one exception to the rule. Housing can be constructed with Title I funds as a last resort under § 206 of the Uniform Relocation and Real Property Acquisition Policies Act of 1970. 42 U.S.C. §§ 4623(b), 4626, 4635 (1976).

The *Coalition* plaintiffs claim that only new construction of federally subsidized housing will accommodate the needs of those "expected to reside" in the suburb. 450 F. Supp. at 47. But the decision does not mention that plaintiffs intended to claim that the grant funds fall within the exception to the rule. Title I applications must, however, contain goals for new construction to give HUD a picture of the applicant's overall development plans. 42 U.S.C. § 5304(4)(B)(i) (1976); 24 C.F.R. § 570.304(b) (1978).

91. 561 F.2d 1032 (2d Cir. 1977) (*en banc*).

92. The allocation of funds for housing assistance uses the housing assistance plan Low Income Housing, 42 U.S.C. § 1437 (1976). Upon receipt of an application for housing assistance the Secretary of HUD must notify the local government to give it an opportunity to object to the application as inconsistent with the Housing Assist-

benefit them if the suburb submitted a proper application. A court of appeals, in *Evans v. Lynn*, found a similar claim⁹³ "amount[ed] to pure speculation and conjecture."⁹⁴

The *Coalition* decision is important because it avoids the strict tests⁹⁵ of *Warth*, allowing inner-city residents to challenge the validity of community development grants to the suburbs. Unfortunately, the grant of standing is unsupportable. Standing for nonresident plaintiffs would alleviate some of the weaknesses of Title I,⁹⁶ and prevent its abuse.⁹⁷ The *Coalition* court evidently avoided the strictures of *Warth* because it took seriously the congressional view embodied in the Housing and Community Development Act, that the problems of inner-city blight are the responsibility of the whole urban community.⁹⁸

John Cowling

ance Plan. *Id.* § 1439(a). In allocating assistance funds the Secretary must consider, among other things, the lower-income housing needs set forth in the Housing Assistance Plan. *Id.* § 1439(d). The use of the plan does not, however, support the *Coalition* plaintiffs' claim. They are challenging Title I funds, not Housing Assistance funds.

93. 537 F.2d 571 (2d Cir. 1975) (*en banc*).

94. 537 F.2d at 595.

95. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (Supp. 1977).

96. See discussion and authorities cited notes 2 and 4 *supra*.

97. For example, Honolulu, Hawaii, plans to spend \$9 million of its \$12-million grant for one year on a new town outside the city. The plan assess \$1.2 million for recreation facilities such as tennis courts, a skating rink, and recreation buildings. No funds are allocated for preservation of existing housing even though the Housing Assistance Plan indicates 17,000 dwelling units suitable for rehabilitation. Kushner, *supra* note 4. Consider also the approved application of Knoxville, Tennessee. Knoxville planned to spend money on a feasibility study of hosting the 1980 World's Fair, and on the renovation of a theater. *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975) (claim dismissed because it was not ripe). The Corning, New York government, used nearly half of its first-year funds on the construction of an indoor skating rink. Kushner, *supra* note 4, at 44 n.31.

98. The court is unwilling to look "behind that Congressional decision to hold that plaintiffs are not *really* benefited by the" Housing Assistance Plan. "If these plaintiffs lack standing, there will be no one able to enforce Congress' intent. We will not assume that Congress passed a statute it knew could not be enforced, especially as to a provision that is such an integral part of the statute." 450 F. Supp. at 51.